Vathanamogan a/l Sinnathamby v Dr Willraja a/l Perumal & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2 (S1)–22–226 OF 2000
KAMALANATHAN RATNAM J
6 APRIL 2001

Civil Procedure *— Pleadings — Striking out claim — Appeal against decision of senior assistant registrar refusing application to strike out writ and statement of claim — Whether appeal frivolous and lacked merit*

The defendants appealed against the decision of the senior assistant registrar refusing the defendants' application to strike out the plaintiff's writ and statement of claim pursuant to the Rules of the High Court 1980. The plaintiff had earlier filed a suit for negligence against the defendants for damages, interests and costs as the defendants had informed the plaintiff that he was HIV I and II antibody positive although four subsequent reports from different specialists stated that he was HIV I and II antibody negative.

Held, dismissing the appeal with costs:

If the second and third defendants are so positive of their result, it is wondered why they made a suggestion in the report that another test be also conducted. In any case, this is a claim for negligence against the second and third defendants. If the said defendants maintain that their test is correct and accurate, then surely there is something amiss because four other reports from four different laboratories had tested the same plaintiff and their reports confirm that the plaintiff was HIV I and II antibody negative. A doubt has arisen as to the accuracy or otherwise of the second and third defendants' report. This in itself warrants that the plaintiff be given the right to prove his case against the second and third defendants (see p 710D–F).

[**Bahasa Malaysia summary**

Defendan-defendan telah membuat rayuan terhadap keputusan penolong kanan pendaftar yang menolak permohonan defendan-defendan untuk membatalkan writ dan penyataan tuntutan plaintif menurut Kaedah-Kaedah Mahkamah Tinggi 1980. Plaintif telah terlebih dahulu memfailkan satu guaman untuk kecuaian terhadap defendan-defendan untuk ganti rugi, faedah dan kos kerana defendan-defendan telah memberitahu kepada plaintif bahawa beliau mempunyai HIV I dan II antibodi positif walaupun empat laporan yang berikut daripada lain-lain pakar yang menyatakan bahawa beliau adalah HIV I dan II antibodi negatif.

Diputuskan, menolak rayuan tersebut dengan kos:
Sekiranya defendan-defendan kedua dan ketiga amat positif berhubung keputusan mereka, adalah menghairankan mengapa

mereka membuat satu cadangan di dalam laporan tersebut bahawa satu ujian lain juga harus dikendalikan. Dalam apa keadaan, ini adalah tuntutan untuk kecuaian terhadap defendan-defendan kedua dan ketiga. Sekiranya defendan-defendan menegaskan bahawa ujian mereka adalah betul dan tepat, maka pastinya ada yang tak kena kerana empat laporan lain daripada empat makmal berbeza telah menguji plaintif yang sama dan laporan-laporan mereka telah mengesahkan bahawa plaintif adalah HIV I dan II antibodi negatif. Satu keraguan telah timbul berhubung dengan ketepatan atau sebaliknya mengenai laporan defendan-defendan kedua dan ketiga. Ini dengan sendirinya mewarankan bahawa plaintif diberikan hak untuk membuktikan kes beliau terhadap defendan-defendan kedua dan ketiga (lihat ms 710D–F).]

Notes

For cases on striking out claim generally, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 3681–3684.

Legislation referred to

Rules of the High Court 1980 O 18 r 19(1)(a), (b), (c), (d)

M Manoharan (*Karpal Singh & Co*) for the respondent/plaintiff.

Harjinder Singh (*Ten Pereira Ng & Din*) for the appellants/second and third defendants.

Kamalanathan Ratnam J:

The appeal

This is the second and third defendants' appeal against the decision of the learned senior assistant registrar given on 12 September 2000 refusing the defendants' application to strike out the plaintiff's writ and statement of claim pursuant to O 18 r 19(1)(a), (b), (c) and (d) of the Rules of the High Court 1980.

Facts

The third defendant is a private laboratory established for the purpose of analyzing blood samples and for conducting various medical tests on patients when requested to do so by medical practitioners. It is not denied that the plaintiff was a patient of the first defendant, a medical practitioner. From the first defendant's clinical records it is noted that on 23 May 1994, the plaintiff had informed the first defendant that he had been tested positive for HIV from the Hospital Besar Kelang. The second and third defendants contend that the first defendant then took a sample of the plaintiff's blood on 21 June 1994 and sent it for analysis to the third defendant's branch at Seremban. The second defendant who was an employee of the Seremban branch of the third defendant then sent the

sample blood to the third defendant's office at Petaling Jaya to perform the analysis for HIV testing. On the other hand, the plaintiff's case is that he went to the first defendant's clinic and the first defendant then took a sample of his blood and sent it to the third defendant for analysis on 21 June 1994. By a report of the third defendant dated 24 June 1994 and signed by the second defendant as the servant or agent of the third defendant, the plaintiff was informed through the first defendant that he was HIV I and II positive and that the testing done was by the use of the Behring Enzygnost and Abbott, third generation test. There was a suggestion in the report that a confirmation be done by using the Western Blot method. It is not my duty at this stage to delve into the mechanics of these tests. Surprised and shocked at the report the plaintiff obtained further advice from specialists and proceeded to obtain a second test on himself. He then went to four different laboratories for tests and each of the four reports stated that he was HIV I and II antibody negative. The plaintiff then filed this suit for negligence against the defendants for damages, interests and costs.

Findings of the court

In their affidavit in support of the application to strike out, the second and third defendants had stated that the test conducted by them was correct and accurate. To my mind, if the second and third defendants are so positive of their result, I wonder why they made a suggestion in the report that another test be also conducted. In any case, this is a claim for negligence against the second and third defendants. If the said defendants maintain that their test is correct and accurate, then surely there is something amiss because four other reports from four different laboratories had tested the same plaintiff and their reports confirm that the plaintiff was HIV I and II antibody negative. A doubt has arisen as to the accuracy or otherwise of the second and third defendants' report. This in itself warrants that the plaintiff be given the right to prove his case against the second and third defendants.

However, during the submission counsel for the second and third defendants submitted that until today it cannot be said with certainty that the plaintiff is actually HIV I and II negative. On that same vein, I asked counsel whether he could say with certainty if the plaintiff was indeed HIV one and two positive. To my surprise counsel said he could not. On this too, I was satisfied that this appeal was frivolous and lacked merit and ought to be dismissed. I therefore indicated that there was no need for me to even hear from the respondent. I therefore dismissed the appeal with costs.

Appeal dismissed.

Reported by Wong Ee Lynn